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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD LEWIS TURNER, Petitioner, vs. M. STAINER, Acting Warden, Respondent.	Case No. CV 11-7259-JPR MEMORANDUM OPINION AND ORDER DENYING PETITION AND DISMISSING ACTION WITH PREJUDICE

PROCEEDINGS

On September 1, 2011, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254, raising three claims for relief, one of which he later voluntarily dismissed. On July 31, 2012, Respondent filed an Answer with an attached memorandum. Petitioner did not file a reply. The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the reasons discussed below, the Court denies the Petition and dismisses this action with prejudice.

BACKGROUND

Petitioner was imprisoned after pleading guilty to an

unspecified offense in 1979 and was released on parole on October 14, 2009. (Pet. Attach. F at 1, 3.) The special conditions of his parole included the requirements that he register as a sex offender under California Penal Code section 290.011 and that he not possess or have access to children's clothing. (Lodged Doc. 3, Ex. E at 2-3.) On March 5, 2010, Petitioner was arrested at his wife's residence for violating those two conditions. (Pet. Attach. F at 2.) On April 20, 2010, Petitioner received a nine-month prison term for violating his parole. (Pet. "Attached Sheet #3.")

On July 27, 2010, Petitioner pleaded guilty to failing to register as a transient sex offender (Cal. Penal Code § 290.011(b)) and was sentenced to 44 months in prison. (Pet. at 2; Lodged Docs. 1-2.) He did not file a direct appeal. (Pet. at 2-3 (noting that his filing in the court of appeal was a "petition for writ of habeas corpus").)

On December 17, 2010, Petitioner constructively filed a habeas petition in Los Angeles County Superior Court, claiming that California Penal Code section 290.011 was impermissibly applied to him retroactively because it was not in effect when he pleaded guilty, in 1979, and that he had been impermissibly denied mental health treatment while on parole, which had caused him to violate the terms of his parole. (Oct. 24, 2012 Lodged Doc.) On February 24, 2011, before the earlier petition had been ruled on, Petitioner constructively filed two more habeas petitions in Los Angeles County Superior Court. (Lodged Docs. 3 & 5.) The first claimed that "Petitioner was denied his rights to participate in [] parole outpatient clinic services under

California Code of Reg[u]lations, Title 15, Division 3, Article 9, Section 3610(a)" (Lodged Doc. 3, Attach. at 8) and that Petitioner's counsel was constitutionally ineffective in failing to adequately investigate potentially mitigating circumstances regarding Petitioner's potential sentence before advising him to plead guilty (id. at 9).[1] The second February 24, 2011 petition was substantially similar. (See Lodged Doc. 5.) On March 18, 2011, the superior court denied the December 2010 petition, finding that even if certain parole conditions had been unlawfully applied to Petitioner, they were "irrelevant to the fact that petitioner failed to register his address with law enforcement" and therefore did not undermine his conviction. (Lodged Doc. 8, Attach. F at 6.) On March 29, 2011, the court denied the February 24, 2011 petitions for various reasons. (Lodged Doc. 4.) The court rejected petitioner's ineffective-assistance-of-counsel claim on the merits. (Id.) One of Petitioner's February 24 petitions was apparently forwarded to the court again for decision (see Lodged Doc. 5 at 1 (showing various file stamps indicating that it was received in the

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[1]It appears that Petitioner may have earlier filed other superior court habeas petitions, challenging various aspects of his parole violations and his conviction for failure to register (see Lodged Doc. 8, Attach. F at 5 (referencing February 8, 2011 petitions)); those petitions have not been lodged with the Court. They were denied on March 29, 2011: the superior court found that Petitioner's challenges to his parole conditions were moot because he was no longer subject to them given that he had been reincarcerated for a new offense; the court noted that "plea bargains are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.'" (Id.)

appellate division on February 28, filed on April 1, and received in the "North District" on April 6)), and the court declined to rule on it, instead ordering that the court's earlier denial be re-sent to Petitioner. (See Lodged Doc. 5 at 42.)

On April 11, 2011, Petitioner constructively filed a habeas petition in the California Court of Appeal, raising claims generally corresponding to grounds one and two of the federal Petition. (Lodged Doc. 6.) That petition was summarily denied on May 12, 2011. (Lodged Doc. 7.) On June 7, 2011, Petitioner constructively filed a habeas petition raising the same claims in the California Supreme Court, which summarily denied it on August 10, 2011. (Lodged Docs. 8, 9.)

On September 1, 2011, Petitioner filed the instant Petition. It alleged three grounds for relief: (1) Petitioner's counsel was constitutionally ineffective in failing to adequately investigate whether Petitioner's parole was revoked for having failed to register as a sex offender before the statutory period for him to re-register had expired (Pet. at 5 & "Attached Sheet #1"); (2) Petitioner's due process rights were violated because his parole was revoked for having failed to register as a sex offender before the statutory period for him to re-register had expired (Pet. at 5 & "Attached Sheet #2"); and (3) Petitioner was punished twice for the same offense, thereby violating double jeopardy, by having his parole revoked and a nine-month sentence imposed and then being prosecuted criminally for the same conduct, resulting in a 44-month sentence (Pet. at 5-6 & "Attached Sheet #3"). On April 18, 2012, after the Court issued a Report and Recommendation recommending that the Petition be

dismissed without prejudice because it was not fully exhausted unless within 21 days of the district judge's acceptance of the Report and Recommendation Petitioner voluntarily dismissed ground three, Petitioner requested that ground three be dismissed. On April 20, 2012, the Court granted Petitioner's request, dismissed ground three of the Petition, vacated its Report and Recommendation, and ordered Respondent to file an Answer to the Petition.

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review of state-court decisions consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000).

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling

Supreme Court law, the two phrases have distinct meanings. Id. at 391, 413. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 365, 154 L. Ed. 2d 263 (2002). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11. A state-court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. Williams, 529 U.S. at 406-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409-10. In other words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770, 786-87, 178 L. Ed. 2d 624 (2011).

Petitioner appears to have raised ground one, or some

semblance of it, in a habeas petition to the Los Angeles County Superior Court, which denied it in a reasoned decision. (Lodged Docs. 3-5.) He then raised it in subsequent petitions to the court of appeal and supreme court, both of which summarily denied it. (Lodged Docs. 6-9.) The Court "looks through" the state supreme court's silent denial on habeas to the last reasoned decision, in this case the superior court's decision, as the basis for the state court's judgment and reviews Petitioner's claim under the deferential AEDPA standard. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 2595, 115 L. Ed. 2d 706 (1991) (holding that California Supreme Court, by its silent denial of petition for review, presumably did not intend to change court of appeal's analysis); Bonner v. Carey, 425 F.3d 1145, 1148 n.13 (9th Cir. 2005) (applying Ylst in state habeas context).[2]

Petitioner raised ground two in habeas petitions to the state court of appeal and supreme court; the petitions were summarily denied. (Lodged Docs. 6-9.) Because no reasoned state-court decision exists as to ground two, the Court conducts an independent review of the record to determine whether the state supreme court, in denying the claim, was objectively unreasonable in applying controlling federal law. See Haney v.

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[2]The Court declines to adopt Respondent's position that the "look through" doctrine applies only when the last reasoned decision on a claim imposed a procedural bar. (See Answer at 4-5.) Nothing in Ylst limits its holding to that context; indeed, it explicitly states, "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." 501 U.S. at 803.

Adams, 641 F.3d 1168, 1171 (9th Cir.) (holding that independent review "is not de novo review of the constitutional issue, but only a means to determine whether the state court decision is objectively unreasonable" (internal quotation marks omitted)), cert. denied, 132 S. Ct. 551 (2011); see also Richter, 131 S. Ct. at 784, 786 (holding that "petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief," and reviewing court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision[,] and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]").

DISCUSSION

I. Habeas relief is not warranted on Petitioner's ineffective-assistance-of-counsel claim

Petitioner asserts that his trial counsel was constitutionally ineffective by "provid[ing] bad advice," advising him to plead guilty without "investigat[ing] into potential mitigating evidence," and "fail[ing] to provide substitute counsel." (Pet. at 5, "Attached Sheet #1.")

Under Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), a petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show

deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The initial court considering the claim must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Supreme Court has recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Accordingly, to overturn the strong presumption of adequate assistance, the petitioner must demonstrate that the challenged action could not reasonably be considered sound trial strategy under the circumstances of the case. Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively

> show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694; see also Richter, 131 S. Ct. at 791 ("In assessing prejudice under Strickland, the question is not whether a court

can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective-assistance-of-counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court reiterated that AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim:

> The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard.

131 S. Ct. at 785. The Supreme Court further explained,

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id. at 788 (citations omitted).

In general, when a criminal defendant pleads guilty to an offense, he cannot later claim deprivations of constitutional rights that occurred prior to the entry of his guilty plea. See Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973); see also Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994) (as amended) (foreclosing most preplea ineffective-assistance-of-counsel claims), superseded by statute on other grounds as recognized in McMurtrey v. Ryan, 539 F.3d 1112, 1119 (9th Cir. 2008).

The Supreme Court recently reaffirmed that when a petitioner suffers prejudice because he rejected a plea based on his lawyer's bad advice, he might be entitled to habeas relief. See generally Lafler v. Cooper, 566 U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). Here, of course, Petitioner accepted the plea bargain he was offered, and therefore Lafler is not on point. In any event, even assuming that the underlying principle of Lafler applies here, Petitioner's claim fails on the merits because he has not met his burden to show that his plea was not voluntary or the state courts' application of the Strickland standard was unreasonable.

The superior court denied Petitioner's claim as follows:

> An ineffective assistance of counsel claim may be denied when the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence. Here the record is devoid of any evidence that any of the tactical or strategic decisions made by defense counsel resulted from anything other than informed tactical choices within the

range of reasonable competence. (People v. Bunyard, (1988) 45 Cal. 3d 1189).

(Lodged Doc. 4 at 1.) The superior court's holding was not objectively unreasonable. In his federal Petition, Petitioner fails to specifically identify what evidence his counsel should have uncovered with further investigation and how it would have been helpful to his case, what advice his counsel gave him and how it was "bad," or in what regard his counsel failed to provide "substitute counsel." On the face of the Petition, Petitioner is not entitled to habeas relief. See Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) ("cursory and vague" claims of ineffective assistance of counsel "cannot support habeas relief").

Although Petitioner does not state that he incorporates the arguments from his earlier state petitions into the federal Petition, even if the Court construes the Petition liberally to do so, see Allen v. Calderon, 408 F.3d 1150, 1153 (9th Cir. 2005) (courts must "construe pro se habeas filings liberally"), Petitioner is still not entitled to habeas relief. In his February 24, 2011 superior court petitions, Petitioner alleged that his counsel was ineffective in failing to investigate "a set up or a conspiracy by parole agent D. Champlin and . . . the POC doctor Kurger" to deny him mental health counseling and medication, which he alleges would have prevented him from violating his parole conditions. (Lodged Doc. 3, Mem. P. & A. at 6-10.) But Petitioner did not provide any evidence of this alleged conspiracy other than his conclusory allegations, nor did he state how the parole office's failure to provide mental health

treatment undermined his conviction or sentence. He does not claim that because of his mental condition he didn't understand that he had to re-register; rather, he argues that his particular circumstances did not require re-registration. And nothing in section 290.011 provides for a different registration requirement or a lesser sentence for transient sex offenders undergoing mental health counseling. See Cal. Penal Code § 290.011. Thus, it was not objectively unreasonable for the superior court to conclude that Petitioner's counsel's advice to plead guilty was an "informed tactical choice within the range of reasonable competence." (Lodged Doc. 4 at 1.)

In his court of appeal and supreme court habeas petitions, Petitioner refined his arguments to allege that his counsel was deficient in failing to investigate or present the defense that he was not guilty because he had five days to register his new address after moving to a new residence and had been staying at his wife's house for only three days before he was arrested. (Lodged Doc. 6, Mem. P. & A. at 2-11; Lodged Doc. 8, Mem. P. & A. at 1-13.) Petitioner conceded that he told his counsel this information (see Lodged Doc. 6, Mem. P. & A. at 3); his counsel, apparently fully aware of Petitioner's contentions, nonetheless advised him to plead guilty. Petitioner states that counsel told him that "the possible consequences of taking this case to trial . . . would more likely result in Petitioner receiving the maximum term . . . and the maximum penalty for being a second striker." (Lodged Doc. 8, Mem. P. & A. at 3.)

It was not objectively unreasonable for the state courts to conclude that Petitioner's counsel's actions constituted sound

trial strategy. See Barrios v. Dexter, No. CV 08-6411-GHK (DTB), 2010 WL 935756, at *9 (C.D. Cal. Mar. 12, 2010) (counsel not deficient in advising petitioner to plead guilty when petitioner's purported defense "gave rise to no viable defense"). A finder of fact may not have believed Petitioner's story that he was living at his wife's house for only three "working" days. Petitioner admitted that he charged his Global Positioning System ("GPS") tracking device and ate meals at his wife's house, and that it was difficult for him to find other shelter. (See Lodged Doc. 6, Mem. P. & A. at 2, 4-6.) Moreover, Petitioner's GPS showed that "on several different dates" in the month leading up to his arrest he spent more than 24 hours at a time at his wife's house. (See Lodged Doc. 8, Attach. A.) Petitioner's medications and mail were found in one of the home's bedrooms, along with men's clothing. (Id.) Under the circumstances, it was reasonable for his attorney to conclude that the judge or a jury would not have found Petitioner's assertions to the contrary credible (particularly given that Petitioner was a convicted sex offender) and may well have sentenced him to a longer sentence than the 44 months Petitioner received as a result of his guilty plea. Because the state courts' rejection of Petitioner's ineffective-assistance claim was not objectively unreasonable, Petitioner is not entitled to habeas relief. See also Lambert v. Blodgett, 393 F.3d 943, 982 (9th Cir. 2004) ("Courts have generally rejected claims of ineffective assistance premised on a failure to investigate where the . . . additional evidence was unlikely to change the outcome at trial."); Jackson v. Calderon, 211 F.3d 1148, 1154-55 (9th Cir. 2000) (finding no prejudice from

counsel's alleged failure to investigate when petitioner did not meet his burden to present evidence that investigation would have revealed favorable evidence).

II. Habeas relief is not warranted on Petitioner's second claim

Respondent construes ground two as a challenge to the sentence Petitioner received for violating his parole conditions and argues that such a claim is not cognizable because Petitioner is currently in custody on a new criminal conviction, independent of his parole revocation. (See Answer at 9-10.) If Respondent's construction of Petitioner's claim is accurate, Respondent is correct that Petitioner may not challenge a sentence on which he is no longer in custody. See Maleng v. Cook, 490 U.S. 488, 490-91, 109 S. Ct. 1923, 1925, 104 L. Ed. 2d 540 (1989) (28 U.S.C. § 2254(a) requires "that the habeas petitioner be in custody under the conviction or sentence under attack at the time his petition is filed" (internal quotation marks omitted)). But as the Court earlier noted in its Report and Recommendation (see Docket No. 19 at 9-10), ground two may arguably be liberally construed as a challenge to the sufficiency of the evidence supporting Petitioner's criminal conviction for failure to register, which appears to be how Petitioner framed this claim before the California Supreme Court. (See Lodged Doc. 8, Mem. P. & A. at 7-10.) That construction of the claim is consistent with Petitioner's allegations as to ground one that his counsel was ineffective for not making the very same arguments to challenge his criminal conviction. (See Pet. at 5, "Attached Sheet #1"; Lodged Doc. 8, Mem. P. & A. at 12.)

To the extent Petitioner's second claim can be construed as

challenging the sufficiency of the evidence to support his failure-to-register conviction, however, it still fails because he pleaded guilty to the offense and therefore cannot claim that the prosecution's evidence was insufficient. (See Lodged Doc. 2 at 1-2 (noting that Petitioner "knowingly, understandingly, and explicitly" waived rights and pleaded guilty)); Tollett, 411 U.S. at 266-67; Hector v. Poulos, 648 F. Supp. 2d 1194, 1197 (C.D. Cal. 2009) ("A defendant who pleads guilty is convicted and sentenced according to his plea and not upon the evidence."); Martin v. Dexter, No. EDCV 08-00693-DOC (MLG), 2008 WL 4381519, at *7 (C.D. Cal. Sept. 23, 2008) ("By pleading guilty . . . Petitioner effectively waived any claim that his constitutional rights were violated as to pretrial matters, which includes a challenge to the sufficiency of the evidence." (citing Tollett)). Moreover, as outlined above, Petitioner has failed to show that his counsel was constitutionally ineffective in advising him to plead guilty or that his plea was not voluntary as a result. As previously recounted, the evidence against Petitioner was quite strong. See Lambert, 393 F.3d at 984 (counsel not ineffective for failing to investigate and uncover potentially exculpatory evidence before advising petitioner to plead guilty in part because evidence of guilt was overwhelming). Thus, on independent review, the Court finds that the state courts' rejection of this claim was not objectively unreasonable.

ORDER

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: November 5, 2012

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE